

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

77-71293

**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellee,

-against-

STANLEY FORSACK,

Appellant.

*On Appeal From The United States District
Court For the Eastern District of New York*

Appellant's Brief

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

STANLEY FORSACK,

Defendant-Appellant.

PRELIMINARY STATEMENT

Defendant-Appellant appeals to this court from a judgment of conviction entered on May 27, 1977 upon a jury verdict after trial which found defendant guilty of violating Title 18, Sec. 922(a)(1) U.S.C., the Federal Gun Control Act of 1968. The judgment of conviction imposed a 3 year prison term and a \$5000 fine upon defendant.

FACTS AND TESTIMONY

Defendant was indicted by the Grand Jury on February 11, 1977 on a charge of dealing in firearms without a license. The charge as presented by the government involved the sale of 5 handguns on 3 occasions to agents of the Alcoholic, Tobacco & Firearms Division of the Treasury Dept. acting in an undercover capacity. A confidential informant, one Kenneth Wilson, participated in at least one of the sales. The confidential informant was a "registered" unpaid informant of ATF.

The first witness for the prosecution was Agent Anthony Rondello. He testified that on September 29, 1976 he met with the informant and Special Agent Pierce Rogers of ATF at Chase's Luncheonette in Floral Park, N.Y. to discuss the purchase of handguns

from an individual identified to him only as "Stan"; "Stan" worked in the Tulip Liquor Store in Floral Park, N.Y. Rondello was provided with money to make the purchase and he and Wilson proceeded to Tulip Liquor Store. When the agent and the informant met Stan at the liquor store the informant introduced "Tony" and initiated a conversation with regard to the purchase of handguns. It was never established just how the parties knew that Stan was going to have guns available for purchase that day. It must be presumed that the arrangements were made previously between the informer and Stan. This presumption is made because Rondello testified that he had never met or spoken to Stan previously and had only met the informer that very day. Rondello testified that 2 handguns were purchased for the sum of \$215. Arrangements were then and there made to purchase 2 additional guns the following week. On the following week, October 6, 1976, Rondello came to Tulip Liquor Store pursuant to the arrangement. He was accompanied by another undercover agent, one Michel Galgano. Another purchase of 2 handguns was made for the sum of \$75. Rondello testified that he handed "Stan" \$150. for the guns and "Stan" returned \$75 to him stating that the total price was \$75 for both guns and not \$75 apiece. Rondello testified that Stan was apprehensive about the absence of Ken Wilson, in fact asked where Ken Wilson was, but proceeded to engage in the transaction anyway. An arrangement was made to purchase a Colt 45 handgun the next week. On October

13, 1976 Rondello entered the liquor store, this time alone, but no sale of any handgun took place. Instead, an arrangement was made to meet the following evening at a bar in Floral Park called The Village Inn. On October 14, 1976, a meeting took place at the Village Inn between Rondello and "Stan" and the sale of a Colt 45 handgun took place. Agent Rondello testified significantly that none of the transactions in and of themselves were a violation of the Federal Gun Control Act.

The next witness for the prosecution was Agent Galgano who in essence corroborated the testimony of Agent Rondello as to the second sale.

The final witness for the prosecution was Agent Pierce Rogers. He was the Special Agent of ATF in charge of the case. Agent Rogers testified that he had not witnessed any of the alleged sales. He stated that in August, 1976 he had received a communication from a registered confidential informant, one Ken Wilson, who advised that an agent from the FBI, never identified, had visited Wilson at Floral Park Sporting Goods, a gun shop at which Wilson was employed. The FBI agent was inquiring about a "Stan" who was allegedly engaged in illegal gun traffic in the Floral Park area. Wilson did not disclose the existence of "Stan" to the FBI agent but instead called Agent Rogers, advised him of the FBI visit and stated that he knew a person named "Stan" who fitted the description given. Apparently a case file was opened at that time. Nothing was done however until September 28, 1976 when Wilson

made arrangements for the first transaction with Stan, and accompanied the undercover agent and participated in the first transaction.

The government did not call Wilson as a witness although he was instrumental in setting up the first buy and participated in it. He also had knowledge of the second transaction, since arrangements were made for it at the first meeting. His testimony was thus vital to a proper presentation of the case, since he was a participant in one transaction, in fact the initiating cause of the transaction, and participated in setting up the second transaction.

Agent Rogers was questioned on cross-examination about Ken Wilson. He testified that he had met Ken Wilson for the first time about 2 years before at a diner. He was introduced to Wilson by a N.Y.C. police officer. Rogers was then investigating a possible ATF violation about which the police officer had reason to believe Wilson could furnish information. He testified that Wilson then volunteered to become an informant because he felt it was his "patriotic" duty. Wilson subsequently was registered as an informant in the ATF.

Significantly, when Wilson was called as a witness by defendant he testified that he met Agent Rogers for the first time in the Floral Park Gun Shop where he was employed and that he volunteered to become an informer. He never testified to any meeting with Rogers in a diner; and never testified that it was

the result of an official investigation by ATF, nor did he testify that he was introduced by a N.Y.C. police officer known to both Wilson and Rogers.

That was the government's case.

The defendant took the witness stand in his defense. He testified that he was a firefighter for the City of Long Beach and the holder of a N.Y. State Pistol License. He testified that he knew Ken Wilson having been a customer of Floral Park Sporting Goods, where he had purchased several weapons. According to Stan, sometime in August or early September, 1976, Wilson approached him to obtain a gun for Wilson's personal use. After defendant turned Wilson down on several occasions, he finally agreed as a personal favor to secure a handgun for Wilson. Forsack was a frequent visitor to and exhibitor at gun shows and exhibits, a fact known to Wilson. In September, 1976 Forsack obtained a handgun at a gun show he had attended and delivered it to Wilson. The price was \$50, Forsack's cost. Forsack then testified that sometime later, at the end of September Wilson again approached him for another personal favor, this time Wilson stated that a co-worker in Floral Park Sporting Goods, named "Joe" would also like a personal handgun. In 1967 Stan had purchased a 22 caliber Lama handgun from Clapp's Sporting Goods in Brattleboro Vt. and he agreed to make the gun available to Wilson for "Joe". On September 29, 1976 Wilson came into the liquor store where Stan was employed and introduced Agent Rondello to Stan. When Stan asked where "Joe" was, Wilson

stated that Joe did not want the gun any longer, but that he had this friend "Tony" who was a New York City taxicab driver and who wanted a gun for his personal safety. The second transaction then took place. Stan further testified that Wilson approached him about other handguns for other cab drivers. Stan attended a gun show in Syracuse, New York on the weekend of October 2-3, 1976 and obtained two additional weapons. Kenny called Stan's home on the evening of October 4, 1976, asked if handguns had been obtained and arrangements were made to consummate the sale on the following, Wednesday, October 6, 1976. On October 6th at the liquor store, Agent Rondello and a person unknown to Stan came into the store and asked about the purchase of the handguns. Stan testified that he knew only about Ken Wilson and inquired as to the whereabouts of Kenny. He further testified that he tried to phone Ken but was unsuccessful. Stan proceeded to sell both guns to Tony and "Nick", for the sum of \$75, his cost.

Stan, in essence further testified that sometime later, Wilson called him and asked about another handgun for his personal use. Stan asked Wilson about the previous gun which he had made available to Wilson, to which Wilson replied that he wanted a larger bore gun. Stan stated that he had obtained a .45 Colt handgun at the Syracuse show, but had not obtained proper documents for it and he could make that gun available for Wilson. Wilson agreed

an arrangements were made for the following Wednesday, October 13th. On October 13th Agent Rondello entered Stan's place of employment and inquired about the 45 caliber Colt. Stan told him that it was not available since it was for Ken Wilson. Stan testified he told Rondello that he would have to speak to Wilson and that Rondello should meet him the following evening at Village Inn when he would let him know. Stan said that he spoke to Wilson who stated he didn't have the money to buy the gun. Thereafter on the evening of October 14 Stan met Rondello at Village Inn, told him that Wilson did not want the gun, a fact known to Rondello, and the sale took place. Forsack further testified that he told Rondello that evening and Wilson at a subsequent meeting that he wanted nothing further to do with either of them. This would seem to negate any continuing course of conduct by Stan. In any event, no further contact was had between Wilson, Rondello or Stan. Defendant was arrested 2 weeks later.

The testimony of defendant differed from that of the agents in several regards. First, whereas the agent testified to three (3) meetings, defendant testified to four (4), the first being with Wilson alone.

That is why agents Rondello and Rogers were cross-examined clearly with regard to the evidence tags and an evidence log maintained at the ATF offices. The failure to produce such logs substantially prejudiced the defense. Agent Rogers agreed to supply the log, but as the testimony establishes he did not pro-

duce same. Instead, he produced what he called "Property Reports". (P. 410 Trial Record). These property reports were not signed by Agent Rondello nor were they countersigned by anyone in the evidence room at the ATF office. They were signed solely by Agent Rogers. Clearly these were not the evidence logs themselves.

The materiality of the testimony of the informer, Ken Wilson is apparent whether one believes the agent's version or defendant's version of the events. He was the inducing agent to the series of sales, he was a participant in either one or two sales (depending on which version is credible), he is a registered informant and clearly under the control of the government and he was not called as a witness by the prosecution.

One other factor should be borne in mind. Agent Rogers testified that Wilson was paid \$70 for his sale in the transaction. \$20 at the first meeting and \$50 thereafter "to cover his expenses". If we are to believe the testimony of the agents, Wilson had no expenses. Curiously, the \$50 paid to Wilson matches the figure which Forsack testified he was paid by Wilson at the first sale of the first gun.

THE SUPPRESSION HEARING

Immediately prior to trial a hearing was held for the purpose of suppressing statements allegedly made by Forsack to Agent Rogers at a meeting had on the morning following his arrest. The meeting took place at the ATF offices in Mineola. The meeting was the result of arrangements made between the defendant and

Agent Rogers during the auto ride back to Floral Park after defendant had been arraigned before a U. S. Magistrate in the Eastern District courthouse. The meeting was arranged as the result of a conversation had between defendant, Agent Rogers and the U. S. attorney, Mr. Weinbach at which it was stressed to defendant that his "cooperation" would be brought to the attention of the Judge who might ultimately decide defendant's fate. Agent Rogers testified that the conversation with the U. S. Attorney was had prior to defendant's arraignment. If so, such conversation was improper and a violation of defendant's constitutional rights to a prompt and speedy arraignment and the right to counsel. If the conversation with Mr. Weinbach took place after arraignment, as testified to by Mr. Weinbach, then such conversation was an improper infringement upon defendant's constitutional rights since he was at that point represented by an attorney from the Public Defender's office of the Legal Aid Society and the defendant had a constitutional right to have his attorney present at such conversation. The conversation took place at the courthouse just prior to or just after arraignment. Certainly, the obtaining of the attorney's presence or his consent to a conversation with defendant was not inconvenient or too much to ask.

The following morning, defendant promptly appeared at ATF offices with the thought still fresh in his mind, that cooperation would be brought to the attention of the court. What was

conveniently omitted and not brought to his attention was the fact that anything he said could and would be used against him. Agent Rogers testified that he did not read to defendant his constitutional rights and did ^{NOT} warn him of his right to remain silent. Thereupon defendant made statements concerning the source of the purchase of five (5) handguns. In this connection it should be brought to the attention of the Court, that at that point in time, the affidavit filed before the U.S. Magistrate and upon which the arrest warrant had been obtained, alleged only one sale, which took place on October 14, 1976. Therefore, the questioning went beyond the then pending charges.

APPLICABLE STATUTES

The charge under the indictment relates to Title 18, Sec. 922(a)(1) of the U.S. Code which provides as follows:

It shall be unlawful for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or ammunition, or in the course of such business to ship, transport or receive any firearm or ammunition in interstate or foreign commerce.

QUESTIONS PRESENTED

The following questions are presented for determination:

a) Did the lower court err in denying the suppression of statements made by defendant after his arrest?

In this connection it is contended by defendant that the actions by the ATF agents during the course of defendant's arrest, the failure to bring defendant before a U.S. Magistrate

for immediate arraignment, the questioning of defendant and discussion of cooperation with the U.S. Attorney prior to arraignment and the subsequent questioning of defendant by ATF agents without advising him of his constitutional rights against self-incrimination rendered all subsequent proceedings void.

b) Did the failure of the Government to disclose the existence of the confidential informant and his name and address prior to trial and the failure to call the confidential informant as a witness render the prosecution null and void?

c) Did the prosecution prove a prima facie case?

In this connection it is contended by defendant that the government failed to prove a prima facie case in that there was no evidence presented on the government's direct case to identify the defendant before the bar as the person who committed the offense charged. A motion was made to dismiss after the government rested its case. The lower court thereupon indicated its intention to permit the prosecution to reopen its case for the purpose of establishing identification. This, it is submitted was reversible error in that it would and did subject the defendant to double jeopardy.

d) Did the lower court take such an active role in cross-examination of defendant that it rendered a fair and impartial jury verdict impossible?

e) Did the failure of the government at trial to produce the evidence logs of the ATF Div. of the Treasury Dept. as to the vouchering of the weapons involved substantially prejudice the rights of defendant and render a fair trial impossible?

f) Did the government's failure to establish predisposition of defendant to commit the offense with which he was charged and the other surrounding facts require a finding that defendant was entrapped as a matter of law?

In this connection it is contended that the arrest of defendant in the first instance was null and void. Defendant was arrested on a warrant issued by a U.S. Magistrate based upon an affidavit of Agent Pierce Rogers stating that defendant had sold one gun to an undercover ATF agent on October 14, 1976. As was brought out at trial, there is nothing under the Federal Gun Control statutes which prohibits or makes illegal the sale of a gun between two unlicensed individuals. That being the case the purpose of the arrest, it is contended, was for the purpose of interrogating defendant and obtaining information which would enable the government to present a prima facie case of "dealing" in firearms at a trial. Defendant was thus "set up" by the use of a confidential informant, and was interrogated after his arrest without being warned that his statements would be used against him.

g) Was the jury verdict against the weight of the credible evidence?

In this connection it is contended that as a matter of law defendant was entrapped into committing the offense charged. This pattern of entrapment continued after his arrest, when he was interrogated by the ATF agent on the day following his arrest and continued throughout the subsequent months when he was cooperating with ATF and they continued to seek information from him.

THE USE OF DECEPTIVE PRACTICES BY THE
GOVERNMENT AGENT, THE FAILURE TO BRING
DEFENDANT TO SPEEDY ARRAIGNMENT AND THE
QUESTIONING OF DEFENDANT BY A US ATTORNEY
PRIOR TO ARRAIGNMENT VIOLATED DEFENDANT'S
CONSTITUTIONAL RIGHTS AND THE DOCTRINE OF
FAIR PLAY

It was established that defendant was arrested on October 27, 1976 upon an arrest warrant issued by a U.S. Magistrate. The arrest warrant was based upon an affidavit of Agent Pierce Rogers, a Special Agent of the Alcohol, Tobacco and Firearms Division of the Treasury Department, which alleged the sale of one gun to an undercover officer on October 14, 1976. At the time of defendant's arrest, he ^{was} placed in the rear of a government vehicle in handcuffs. Sitting in the back of the vehicle, likewise in handcuffs, was one of the individuals who had participated in one of the transactions. It turned out that the participant was agent ^{Rondello} ~~Galano~~, who had accompanied Agent ^{GALANO} ~~Rondello~~ on the second sale. ^{Rondello} ~~Galano~~ was not identified as an ATF agent, but the impression was created and defendant was led to believe that ^{Rondello} ~~Galano~~ was likewise under arrest. Under the rear of the front seat was a tape recorder, which Forsack accidentally damaged in getting into the vehicle. Agent Rogers testified at the suppression hearing that this was just "part of our showmanship". (pp.17-18 Trial Record). The arrest took place between 10 and 11 AM and defendant was brought for arraignment at about 3PM.

Agent Rogers further testified that after defendant was brought to the Eastern District Court, he was taken directly to the office of the US Attorney, Mr. Weinbach. (pp.20-23 Trial Record). There for the first time it was disclosed that defendant was being charged with the

sale of a gun to an under cover ATF agent. As Rogers testified, the US Attorney then proceeded to inquire about defendant's willingness to "cooperate" with ATF. Defendant was told that if he cooperated, the facts would be made known to the Court. Given the circumstances, it is respectfully submitted that the procedures employed violated the concept of fair play. US v. Mallory 354 US 449, 77 S.Ct. 1356, 1 L. Ed. 2d 1749; Watson v. US, 249 F.2d 106; McNabb v. US 318 US, 332.

The defendant was placed at an undue disadvantage. Defendant was not advised of his right to counsel; he was not asked if he wished to consult counsel before talking with the US Attorney; he was not brought to speedy arraignment. The US Attorney, Mr. Weinbach, was called to testify by the government at the suppression hearing. He testified that he thought that his conversation with Forsack regarding cooperation had taken place after arraignment. This is in direct conflict with Agent Rogers testimony. One is not telling the truth. In any event, there was created an aura of official misconduct tainted the further prosecution of this matter.

After arraignment, Agent Rogers offered to drive defendant back to his car in Floral Park, New York. It was during this drive that the question of cooperation was again discussed. (p25, line 14, Trial Record) In this connection, the Court is respectfully referred to the case of Williams v. Brewster, 375 Fed. Supp. 170, affd, 509 F.2d 227, which holds that a ride in a government auto from one city to another is a pre-trial event during which defendant had the right to counsel.

On the ride back to Floral Park discussions were had and

Agent Rogers handed defendant a business card and a meeting was set up for the following day at ATF offices. As defendant testified, he thought he had no choice in the matter.

The next day, October 28th, defendant appeared at ATF offices and met with Rogers. Agent Rogers admitted that he did not advise defendant of his constitutional rights before commencing the interview. (p.30 Trial Record). The question of counsel was raised and Agent Rogers allayed defendant's fears by stating that Mr. Kelly was a good man and defendant should listen to him. (pp.31-32 Trial Record) No question was of course raised as to calling Mr. Kelly and getting his consent to the meeting.

No doubt to further allay defendant's apprehension about events, agent Rogers told defendant that ATF had purchased five (5) guns from Forsack in an undercover capacity. This although the charge on which defendant had been arraigned, specified only one (1) such purchase. The agent questioned defendant as to the sources of his supply for the guns. The statements made by defendant were utilized at trial against him. To illustrate the unfair tactics employed by the government agent to lull defendant into making any statements, the record establishes that discussion was had with regard to defendant becoming an informer for ATF and he was in fact offered expense money for his efforts. (p30, lines 10-15, Trial Record). At the suppression hearing, Forsack testified that the agent told him that the entire conversation was "off the record". This did not turn out to be true and it is submitted that the agent never intended such meeting and the statements emanating therefrom to be off the record. Significantly,

however, no record was ever made by the agent as to what had transpired at the meeting. It is respectfully submitted that the failure of the agent to afford defendant constitutionally guaranteed safeguards and warnings require that any statements obtained be suppressed. The Court below did not agree. There is a presumption against an effective waiver of constitutional rights. *Glasser v. US* 315 US 60, 62 S Ct. 457. *Miranda v. Arizona*, 384 US 436. It has further been held that after the initial appearance in Court, the absence of counsel at any interrogation, "... stands as an impenetrable barrier to any interrogation." *US v. Cookston*, 379 F. Supp. 487; Rule 5c, F.R. Cr. P.; US Constitution, Amendment 5 and amendment 6.

THE FAILURE OF THE GOVERNMENT TO
FURNISH THE DEFENSE WITH INFORM-
ATION AS TO THE INFORMER, HIS
NAME AND ADDRESS AND THE FAILURE
OF THE GOVERNMENT TO CALL THE
INFORMANT AS A WITNESS REQUIRES
REVERSAL AND DISMISSAL OF THE
INDICTMENT

At the outset, it is to be noted that in defendant's pre-trial omnibus disclosure motion, defendant requested information from the government as to the presence of a confidential informant, and names and addresses of any such informants. The Court summarily denied the request. It is submitted that this was error. *Roviaro v. US* 353 US 53; *US v. Anglada*, 524 F2nd 296; *US v. Morrell* 524 F2nd 550.

On the Friday prior to the commencement of trial, defendant's counsel received a telephone communication from Miss Schwartz, the US attorney who was to present the case. The trial was to commence the following Monday morning. It is to be further noted that this was just prior to the Easter weekend. Miss Schwartz informed counsel that there was a confidential informant in the case, but that she did not intend to call the informant as a witness as she felt that his testimony would be 'cumulative'. She inquired whether defendant would want to call such informant as a witness. At that late hour, certainly there was little to be done to prepare. At about 3:30 PM in the afternoon, Miss Schwartz called back to give the name of the informant as Ken Wilson and she furnished the only address she

had, which was the address of his place of work, Floral Park Sporting Goods. A subpoena was prepared and subsequently served over the Easter weekend. This was not the fairness required in government prosecution.

After trial commenced, it became apparent that Wilson had played more than just a peripheral role in bringing the ATF agents in contact with defendant. Agent Rogers testified that it was Wilson's telephone/^{call} concerning the visit of the unidentified FBI agent, which initiated his investigation. If the informant's participation in the transaction or transactions stopped there, he being just a 'tipster, of course, no one could seriously contend that his presence or testimony at trial was necessary. But the informant's activities did not stop there. According the the government agent's, he was used to introduce agent Rondello to defendant in the first transaction and participated in same. He was instrumental in setting up the second transaction and as the agent's testified his name came up in the course of that meeting. Defendant's version of the transactions places an even greater significance as to Wilson's involvement. Whichever version the jury chose to believe and whether or not it chose to believe portions of both versions, the testimony of Wilson was necessary in order to assure a fair trial. Wilson being a 'registered' informer, what justification could the government offer so as to waive the requirement of his production and testimony.

Instead, defendant was obligated to produce Wilson, by way of subpoena at the eve of trial. An indication of the conflict which Wilson's testimony would have placed in the case is readily apparent. Wilson's version of how he became an informer, (p. 298, Trial Record) substantially conflicts with the testimony of Agent Rogers (pp220,229-230, Trial Record). Wilson conveniently omitted that he was introduced to Rogers through a NYC police officer, while agent Rogers was actively investigating a possible ATF violation, which the police officer thought Wilson might have knowledge of. Obviously either the agent's version is untrue or the informant's version is untrue. The stories are diametrically opposed. A question was asked of Wilson, concerning whether he had a license to operate a motor vehicle. The Court sustained an objection thereto, stating that it was the defendant who was on trial and not Wilson. Obviously the remark was uncalled for. The legitimate purpose of the question was to establish the relationship of Wilson to the agents and to show that Wilson was brought to the trial in a government vehicle in the company of the ATF agents. Defendant further intended to establish that Wilson was in the company of the government agents throughout the course of the trial in the Judge's witness room. Questioning about Wilson's prior criminal involvements was not permitted in the presence of the jury. It was the Court's position that defendant was trying to impeach the witness. Stated the Court, " You cannot impeach your own witness...." (P. 299, Trial Record). Obviously, the Court overlooked Rule 607 of the Federal Rules of Evidence which provides

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that the credibility of a witness may be attacked by any party, including the party calling him. (Emphasis supplied).

Faced with the Court's refusal to permit impeachment of Wilson, the examination was not pursued further. It is respectfully submitted that the refusal of the government to call Wilson as a witness and combined with the refusal of the Court to permit impeachment of Wilson, by the defense when they were forced to call him as a witness is a direct violation of Rule 607 and is reversible error. *Roviaro v. US, supra*; *US v. Morrell, supra*. Defendant was deprived a a fair trial thereby.

THE LOWER COURT ERRED IN FAILING TO
GRANT DEFENDANT'S MOTION TO SUPPRESS
STATEMENTS MADE TO THE ATF AGENT

the Lower Court's position in denying defendant's motion to suppress was based upon its interpretation that the statements were voluntarily made. The Court believed that since defendant ^{no} was/longer in custody, his appearance at the ATF office the following day was purely voluntary. The Court did not feel it incumbent upon Agent Rogers to give the constitutional warnings as it stated, for a third time, before commencing to elicit information. Nor did it feel it important that defendant have the advice or knowledge of his attorney. What is clear is that defendant had been told by the US Attorney the day before that " cooperation" would be beneficial to him and would be brought to the attention of the Court at some future time. Such promises or statements, although vague, might have just the desired effect upon a layman. This especially in view of the fact that the US Attorney told defendant to 'bare his soul'. It is defendant's position that the arrest warrant was defective, since it was based upon an affidavit alleging only one sale. As was testified to by the agent Rondello, at trial, such single sale is not in and of itself illegal. But assuming arguendo, the validity of the arrest warrant, it is respectfully submitted that the purpose of the interrogation was to elicit information so as to 'dealing' in firearms so as to bolster the government's case. Evidence of illicit purchases and other activities would no doubt round out the government's

case. Under the circumstances, such interview was not fair play and was improper. It is respectfully submitted that defendant's state of mind was such that he was still under compulsion. His fear was further amplified by the disclosure of Agent Rogers that the sale of five handguns was alleged and not the sale of only one handgun, which he had been arrested for at the time. The compulsion was thus more than subtle. Defendant believed that cooperation was absolutely essential. He had to be made aware of the fact that his situation was hopeless. The 'cooperation' contemplated included testifying before a grand jury against Victor Accedino in a then pending proceeding. Under the circumstances, it cannot be seriously contended that defendant had a free choice and chose to ignore the consequences. It cannot be contended that defendant freely, voluntarily and knowingly chose to make statements against his interest. It was the further duty of Agent Rogers to at the very least notify defendant's attorney. *Miranda, v. Arizona, supra; Williams v. Brewster; supra, US v. Cookston, supra; Glasser v. US, supra.* The denial of the motion to suppress should be reversed and a new trial ordered.

It is respectfully submitted that the entire record viewed in its totality, rendered a fair and impartial jury verdict impossible and requires reversal of the conviction and dismissal of the indictment.

PREJUDICIAL CONDUCT BY THE TRIAL COURT REQUIRES
REVERSAL OF THE JURY VERDICT.

During the course of the trial the lower court indulged in conduct most prejudicial to the defendant. This conduct commenced during the course of the suppression hearing immediately prior to the actual trial and continued during the course thereof. It may have been apparent to the court that the Assistant U.S. Attorney trying the case for the government lacked experience and therefore the court felt it incumbent upon itself to even the odds by taking an active part in the cross-examination of defendant.

At page 366 of the trial record, the following questioning took place by the court:

THE COURT: Wait a minute, you felt you had to inquire, you had that gun the first one you sold him, in your possession?

A. I did not, your Honor. I beg your pardon.

THE COURT: I though you had one gun you bought in Vermont in 1967?

A. Yes.

THE COURT: You had that gun available?

A. That wasn't available at the time, I hadn't even thought about that yet.

THE COURT: But it was there, wasn't it, in your possession?

A. No, not in my immediate possession, your Honor.

THE COURT: Where was it?

A. It was stored away.

THE COURT: But you had it?

A. Yes.

THE COURT: It belonged to you?

A. Yes, it belonged to me.

THE COURT: And so, it wasn't a question of inquiring, you had a gun that you could have sold him?

A. Yes, if you want to --

THE COURT: Yes.

Again at page 368:

Q. And in the course of working in that store, did he have occasion to meet salesmen of firearms?

MR. KOHN: Your Honor, I object, respectfully object.

THE COURT: Overruled.

A. He did have --

MR. KOHN: It calls for the conclusion of what he knows, what somebody else knew

THE COURT: Apparently, he knows what Mr. Wilson's moves were, I'll let him testify to his knowledge.

Q. Didn't you just testify that Mr. Wilson said he had to buy off a salesman or something to that effect?

A. No, I didn't say that.

Q. Well, do you think that --

THE COURT: Wait a minute. Didn't you just finish telling us a moment ago, that he had to pay off a salesman to get you certain things that you wanted?

A. Your Honor, she inferred if I was ever threatened?

THE COURT: No, no, just go back a moment ago. -14-

There was a discussion of favors that Mr. Wilson had done for you and one of the favors was, he paid off some salesman to get you some special guns; isn't that right?

A. No, I don't think that's right. I don't think that was right at all, your Honor. If that's the way you got it's --

THE COURT: Who did he pay off?

A. He knew salesmen that came into his store, salesmen came into every store.

THE COURT: But, you said he did something moral or illegally improper on your behalf to obtain special guns for you; isn't that right?

A. Yes, all right, now I understand what you mean.

THE COURT: And didn't he pay some salesman to get those guns?

A. Yes.

THE COURT: So, he knew salesmen and he dealt with salesmen?

A. Yes.

THE COURT: And that was the question?

Again at page 383:

THE COURT: You keep saying transferred to him, he gave you money and you gave him a gun?

A. Yes. Sold, if that --

THE COURT: Don't you think that constitutes a sale?

A. Yes, I sold them to him for 75 dollars.

Q. And, of course, when you agreed to sell the guns, you just had the guns in the back and brought them right out

in the liquor store, and gave them to him right over the counter in full view of everybody; right?

At P. 389 the court again felt it necessary to interrupt cross-examination by the U.S. Attorney to conduct its own examination:

THE COURT: Is this a casual sale, the 3rd time around in your mind?

A The casual sale of my personal property.

THE COURT: No, listen to me for a minute. The 3rd time around, you sold to this man, Tony; is that right?

A The 3rd time?

THE COURT: September 29, you sold him a gun?

A I sold the gun to Kenny Wilson.

THE COURT: You said he hands it to Tony.

A Right.

THE COURT: And you saw the money come from Tony?

A Yes, I did.

THE COURT: And you sold two guns on October the 5th?

A Yes, I did.

THE COURT: And now you are up to a .45 on October the 14th?

A. Yes.

THE COURT: And they're still casually selling in your mind?

A Casual sales of personal property. How else can I explain it?

THE COURT: Is that the way you regard it?

A That's the way I regard it.

THE COURT: All right.

Again at p. 391

THE COURT: Did you get a bill of sale for that gun?

A No I didn't, your Honor. I didn't get a bill of sale, unfortunately.

THE COURT: Okay. You don't have a bill of sale for any of the guns; do you?

A Yes, I do, your Honor.

THE COURT: Which ones?

A The Lama .22.

THE COURT: That's the only one?

A Yes, sir.

At p. 395 the following question took place again by the court:

THE COURT: And then he reneged on the purchase?

A He didn't have the money at the time, not that he didn't want to buy, he didn't have the money.

THE COURT: And so, not having the money and reneged on the purchase, and then he felt he was entitled to 25 dollars?

A Your Honor, he didn't renege on the purchase, I reneged on the purchase because he didn't have the 175.

THE COURT: Well, that's a reason, he reneged because he didn't produce the money; is that right?

A I reneged because I wouldn't give him the gun.

THE COURT: I see, all right. You would have sold

it to him if he had the 175?

A I would have given it to him. I asked, as I testified before, go to the cash register and again hit it for 175.

THE COURT: You would have told him to take the money?

A Yes.

THE COURT: So, it was he who reneged?

A He reneged?

THE COURT: Yes, because he didn't give you the 175.

A If I would have given him the gun and come back with 175, he would have taken it.

THE COURT: That's because he didn't have the money.

A Yes.

At p. 396, the court asked the following questions:

THE COURT: Did you write out a check for the 25 dollars and give it to him?

A Did I write out a check for 25 dollars?

THE COURT: Yes?

A No, I didn't write out a check for 25 dollars, your Honor.

THE COURT: All right.

The dripping sarcasm in the question although it cannot appear in the record becomes apparent when one reads the next question asked by the U.S. Attorney:

Q Now, each time you were paid, you were paid -- did you take Master Charge?

A I beg your pardon?

MR. KOHN: Objection.

MISS SCHWARTZ: I'll withdraw the question, your Honor.

There are other references throughout the trial transcript of instances in which the trial court took an active role in cross-examination of defendant. Whatever motive impelled the court to so act, it is obvious that it took more than a passing interest in cross-examination. The interest of the court in direct examination and cross-examination of other witnesses is not present in the trial transcript. The effect of such examination on the jury cannot be calculated. By the very nature of the questioning the jury had to be influenced by it. It is respectfully submitted that the lower court abused its discretion and went beyond the rules of fair play and thus rendered a fair trial impossible. It is respectfully submitted that the court's actions require reversal.

THE GOVERNMENT FAILED TO MAKE
OUT A PRIMA FACIE CASE

At the close of the government's case, upon the ground that not one of its witnesses had identified the defendant before the Court as the person who had committed the crime alleged. Ordinarily, the question of identification of the defendant is one for the jury. But here no evidence had been submitted on the question of identification and therefore, no evidence upon which the jury could decide. US v. Connor 282 F. 2nd.963, affd 420 F. 2nd. 644. The Court indicated that it would permit the government to reopen its case if the objection was pursued. While it is true that normally the question of permitting a party to reopen its case after it has rested is left to the discretion of the Trial Court, US v. Williams, 336 F. 2nd, 183; US v. Glass, 421 F. 2nd 832, it is submitted that the granting of such relief here would have been an abuse of discretion. The failure to submit identification testimony was no mere technicality or oversight. At issue was a substantial substantive issue which the Court overlooked. Realizing that there had been no identification, the US Attorney in cross-examination of the informer witness, who had been called by the defense, proceeded to ask a series of questions concerning the identity of the defendant. (p. 304, Trial Record, lines 15-23) The line of questioning was highly improper in view of an agreement reached at a side bar conference, just before she asked the questions. (p. 304, Trial Record). More important, defendant was deprived the opportunity of cross examining the government witnesses, the ATF

agents as to the source and means of their identification of defendant. If their identification came from the informer Wilson, then Wilson was an indispensable witness for the prosecution. It is submitted that such failure of proof requires reversal. The government may not fill in its prima facie case on cross examination of a witness called by the defense.

THE FAILURE OF THE GOVERNMENT
TO PRODUCE THE EVIDENCE LOGS OF
ATF REQUIRES REVERSAL OF THE
CONVICTION

At trial, Agent Rondello was closely cross examined concerning the procedure followed when evidence is acquired use in a possible future prosecution. (p. 149 Trial Record, 4 to 12). Agent Rogers was also questioned and agreed to produce the evidence logs referred to. s

The purpose of the defense request was not to harass the witness. The purpose was a legitimate and valid one. Defendant's version of the transactions differed from the prosecutions in several respects. One difference was that whereas the government agents had only testified to 3 sales, defendant had testified to 4 sales, the first being with Wilson alone. If the evidence logs showed four entries, it would bolster defendant's testimony and cast doubt on the government agents.

Agent Rogers was recalled by the defense for the purpose of producing the evidence logs referred to. The agent instead produced three documents called, " Property Reports", which were introduced in evidence. (P. 410 Trial Record). The agent identified these property reports as true and exact copies of the log record maintained at the evidence room at the ATF offices. (P. 410, Trial Record). As further questioning established, the reports produced were not exact copies of the evidence logs, but were reports prepared by Agent Rogers himself. The evidence log was not produced. (P410-417, Trial Record).

Significantly, the reports produced do not bear the signature of agent Rondello, nor did they bear the signature of the Property Clerk in the Evidence room. They only contain the signature of Agent Rogers himself. The failure to produce such logs resulted in the/ability of defendant to corroborate his version of the events by independent evidence. It is respectfully submitted the failure to produce such evidence logs and the concealment of same requires reversal. It is incumbent upon the government to produce all documents which have a direct bearing on all issues, even if such evidence may be exculpatory in nature. US v. Brady. The failure to do so tainted the prosecution.

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE
REVERSED AND THE INDICTMENT DISMISSED.

Respectfully submitted,

ROGER W. KOHN
Attorney for Appellant

KOHN

STATE OF NEW YORK)
 : SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 10 day of August 1977 deponent served the within *BAILEY* upon

U.S. Atty. East. Dist. of NY

attorney(s) for
Appellee

In this action, at

225 Cadman Plaza East, Brooklyn, NY

the address(es) designated by said attorney(s) for that purpose by depositing 3 copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey
ROBERT BAILEY

Sworn to before me, this 10 day
of August , 1977

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978

